IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs November 14, 2006

STATE OF TENNESSEE v. MICHAEL E. LONES

Direct Appeal from the Criminal Court for Washington County
No. 29821 Lynn W. Brown, Judge

No. E2005-02777-CCA-R3-CD - Filed March 6, 2007

The appellant, Michael E. Lones, pled guilty in the Washington County Criminal Court to rape, and the trial court sentenced him to eight years in confinement. On appeal, the appellant claims that the trial court erred by denying his request for probation. Upon review of the record and the parties' briefs, we affirm the trial court's denial of probation. However, we remand the case for entry of a corrected judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed and Case Remanded.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

T. Wood Smith, Greeneville, and James Bowman, Johnson City, Tennessee, for the appellant, Michael E. Lones.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Joe C. Crumley, Jr., District Attorney General; and Janet Hardin, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The State presented very few facts about the crime at the guilty plea hearing. However, the appellant admitted to the trial court that he performed oral sex on a fourteen-year-old female. Pursuant to the plea agreement, the appellant received an eight-year sentence, with the manner of service to be determined by the trial court after a sentencing hearing.

At the sentencing hearing, Tina Blankenship testified that she was married to the appellant from January 1999 to early 2000 and that the victim is her daughter from a previous marriage.

Blankenship divorced the appellant, and she and the victim moved into another home. In late 2000 or early 2001, the appellant moved in with Blankenship and the victim, but Blankenship and the appellant did not remarry. Between October 2003 and February 14, 2004, Blankenship noticed that the victim asked to go to work with her a few times. However, Blankenship's adopted son worked at the same store as Blankenship, and Blankenship assumed that the victim wanted to help him and did not want to be bored at home with the appellant. In December 2003, Trisha Watts, the victim's friend, moved in with the family because Watts did not have a place to stay. On February 14, 2004, Blankenship returned home from work and found Watts crying on the couch and the victim crying in the victim's bedroom. The girls would not tell Blankenship why they were crying, and Blankenship left the home, found the appellant, and asked him if he had "messed with" the victim. The appellant said no, and Blankenship told him that "we need to go to the house. We need to get it straightened out." Blankenship got into her truck and followed the appellant's car toward their home. When the appellant got to a stop sign about one-quarter mile from the house, he sped toward the home in an attempt to get there before Blankenship. Blankenship drove through a neighbor's yard, and she and the appellant got to their front porch at the same time.

Blankenship asked the appellant again if he had molested the victim, and the appellant said, "[Y]es, I did. I wanted to protect her from these young guys getting her pregnant . . . so, I made her afraid of it." The appellant did not mention anything about the victim's bringing home a bad report card or his having to discipline her. Blankenship threatened to kill the appellant, and the appellant left. Blankenship stated that she found the victim and Watts at a neighbor's home and that the girls were hysterical. She said the victim began going to therapy but had to stop because the victim's TennCare was cancelled. She stated that since the rape, the victim only sleeps two to three hours each night and sleeps with her bedroom door locked. She stated that the victim also sleeps with a sixty-pound pit bull on her bed and sleeps with a switchblade knife. She said the victim is very angry, keeps a knife with her at all times, failed her freshman year of high school in 2004, and will be affected by this for the rest of her life.

James Anthony "Tony" Doss, Tina Blankenship's nephew, testified that he lived with Blankenship, the appellant, and the victim in October 2003. One evening, Doss was playing video games in his bedroom, and the victim went into the master bathroom to take a shower. The appellant checked on Doss and then went into the master bedroom, which was attached to the bathroom. The appellant shut the bedroom door, and Doss went to the bedroom and knocked on the door. The appellant opened the door slightly, and Doss "suspected something" was going on between the appellant and the victim. Later, the victim came out of the bedroom and was crying. Doss stated that he had seen the appellant go into a room alone with the victim many other times, and the appellant later told Doss that he was sexually abusing the victim. Doss stated that the appellant threatened to "call DHS on me" if he told anyone about the abuse and that he was afraid of the appellant.

The then fifteen-year-old victim testified that she called the appellant "daddy" and felt like he was a father in their home. When the victim brought home a bad report card, the appellant spanked her with a belt and told her that if she brought home another bad report card, her punishment

would be "doubled." In October 2003, the victim brought home a second bad report card, failing all but two subjects. The victim showed the report card to the appellant, and he said that "you know what's going to happen." They went into the victim's bedroom, and the victim thought the appellant was going to spank her again. Instead, the appellant told the victim to take off her clothes and lie on the bed. The victim did as she was told, and the appellant performed oral sex on her. The appellant told the victim that he would kill her family if she told anyone. The victim was afraid but later told her mother about the rape because she believed the appellant was going to do the same thing to Trisha Watts. She stated that since the rape, she no longer sleeps and keeps a knife in her purse.

Williams H. Blevins, Jr., the victim's father, testified that he learned about the rape from the victim's mother two months after it occurred and that he had begun spending more time with the victim since that time. He stated that the victim barricades her bedroom door, is moody, and cries a lot and that "she goes into this scared blank look" when she sees the appellant in public. Blevins has seen the appellant ride by the victim's house at least once. On cross-examination, Blevins testified that he did not know the victim was his daughter until she was eleven years old.

The appellant's presentence report was introduced into evidence. According to the report, the then forty-year-old appellant dropped out of high school in the eighth grade and never obtained his GED. He described his mental health as fair, stating that he received in-patient treatment for depression at Lakeshore Mental Health in February 2004 and currently took Xanax for a nervous condition. The appellant reported that he began drinking alcohol when he was seventeen or eighteen years old but had not used alcohol since December 2003. At the time of the report, the appellant was unemployed but had worked for the Tennessee Department of Transportation from June 1997 to February 2004. According to the report, the appellant has no prior criminal record.

The appellant's sex offender risk assessment was also introduced into evidence. According to the assessment, the appellant was "evasive and continually attempted to avoid discussing the specifics of the [offense] by placing responsibility on the victim's mother, as well as by pausing for significant periods of time throughout the interview." The appellant admitted to interviewers that he was sexual with the victim but stated that he was sexual with her as a form of discipline. The appellant denied being sexual with any other minor. However, the assessment states that the appellant did not appear to be truthful and, therefore, that his denial of sexual contact with any other minors was unreliable. The appellant's empathy for the victim was considered poor. The assessment estimated that the appellant was a moderate risk to re-offend, that he could be treated in a "very long-term" out-patient program, and that his "prognosis, with long-term probation requiring him to complete treatment appears fair."

The trial court held that the appellant clearly abused a position of private trust and that this factor "carries a great deal of weight." See Tenn. Code Ann. § 40-35-114(14). In considering the circumstances of the offense, the trial court noted that the victim was young. The trial court stated that the appellant planned and "thought out" the crime and that he committed it intentionally and knowingly. Thus, the trial court believed that the need for deterrence weighed against the appellant's

request for probation. The trial court noted that the appellant had no criminal history, which "makes this case so difficult"; that he was in good physical condition; that he had a good employment history; and that he owned his home and had debts. The trial court stated that all of those factors weighed in the appellant's favor. However, the trial court also noted that according to the appellant's sex offender risk assessment, the appellant blamed the victim's mother for his actions. Although the trial court noted that the assessment concluded that the appellant was treatable in an out-patient program, the court described the appellant's potential for rehabilitation as "questionable." The court concluded that the appellant's behavior was "absolutely inexcusable" and that the appellant should serve his sentence in confinement.

II. Analysis

The appellant claims that the trial court should have granted his request for probation or some other form of alternative sentencing. He contends that his lack of a prior criminal record supports his request for probation and that no evidence was presented to support the need for deterrence. He also contends that although the trial court considered his potential for rehabilitation to be questionable, his sex offender risk assessment considers his potential to re-offend as low. The State contends that the trial court properly denied the appellant's request for alternative sentencing. We agree with the State.

Appellate review of the length, range, or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210; see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentences. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Initially, we recognize that an appellant is eligible for alternative sentencing if the sentence actually imposed is eight years or less. See Tenn. Code Ann. § 40-35-303(a) (2003).[1] Moreover, an appellant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. §

[1] Effective June 7, 2005, the legislature amended several provisions of the Criminal Sentencing Reform Act of 1989. However, the appellant committed the crime in this case before June 7, 2005, and he did not "elect to be sentenced under the provisions of the act by executing a waiver of his ex post facto protections." Tenn. Code Ann. § 40-35-114, Compiler's Notes. Therefore, the 2005 amendments do not affect the appellant's case, and we have cited the statutes that were in effect at the time the appellant committed the offense.

40-35-102(6) (2003). In the instant case, the appellant was convicted of a Class B felony; therefore, he is not presumed to be a favorable candidate for alternative sentencing. However, because the appellant a received sentence of eight years or less, he may still be considered for alternative sentencing. See Tenn. Code Ann. § 40-35-303(a). Under the 1989 Sentencing Act, sentences which involve confinement are to be based on the following considerations contained in Tennessee Code Annotated section 40-35-103(1):

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence was imposed. See Tenn. Code Ann. § 40-35-103(2), (4). Further, the "potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed." Tenn. Code Ann. § 40-35-103(5).

The record reflects that the trial court believed the appellant's prior employment, social history, and lack of a prior record weighed in favor of granting his request for probation. However, the trial court also believed that the circumstances of the offense, particularly the victim's age and the fact that the appellant abused a position of private trust, weighed against the request and that deterrence was necessary in this case. Furthermore, the court was obviously concerned about the appellant's sex offender risk assessment, stating that "he can be treated, but . . . that, at best, is a neutral factor, and very likely one that still weighs against him." In our view, the assessment is troubling. According to the assessment, the appellant admitted that he spanked the victim and licked her vagina as punishment for her bad report card. However, the assessment provides that the appellant shifted responsibility for the crime, was evasive, and did not appear to be truthful when he denied sexual contact with other minors. It concludes that the appellant's "lack of full disclosure is associated with a poor treatment outcome," that he is a moderate risk to re-offend, and that he "is likely to have a moderate frequency of sexual misconduct with a child or children." In short, the assessment reflects poorly on the appellant's potential for rehabilitation, and the trial court did not err by concluding that the appellant should serve his sentence in confinement.

The appellant also contends that he received the ineffective assistance of counsel because his trial attorney did not cross-examine witnesses thoroughly and failed to call any witnesses to testify on his behalf at the sentencing hearing. However, the appellant has failed to cite any authority in his

brief as required by Tennessee Rule of Appellate Procedure 27(a)(7) and states that this issue "is not ripe for review, unless [this] Court concludes that the record on [its] face shows that he did not receive such assistance." As this court has said,

> [T]he practice of raising ineffective assistance of counsel claims on direct appeal is "fraught with peril" since it "is virtually impossible to demonstrate prejudice as required" without an evidentiary hearing. Instead, "ineffective assistance of counsel claims should normally be raised by petition for post-conviction relief."

State v. Blackmon, 78 S.W.3d 322, 328 (Tenn. Crim. App. 2001) (citations omitted). Given that no evidentiary hearing was held and that the trial court had no opportunity to make findings of fact, we conclude that it is inappropriate for us to consider this issue. This ruling does not prevent the appellant from raising the issue again in an appropriate post-conviction proceeding.

Finally, we note that the judgment form shows that the appellant is to serve his sentence consecutively to any prior unexpired sentences. However, the appellant has no prior convictions, and we remand the case to the trial court for correction of the judgment.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the trial court's denial of the appellant's request for probation but remand the case for entry of a corrected judgment.

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NORMA McGEE OGLE, JUDGE